

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES C. SEXTON JR. AND ESQUIRE
GROUP LLC.

Case No. 2:13-cv-00893-RFB-VCF

ORDER

Plaintiffs,

V.

KAREN L. HAWKINS, Director of Office Of
Professional Responsibility, Internal Revenue
Service, Department of Treasure,

Defendant.

I. INTRODUCTION

Before the Court are Plaintiff James Sexton's Motion for Judgment on the Pleadings (ECF No. 56) and Defendant Karen Hawkins's Motion for Summary Judgment (ECF No. 59, 64). This case arises from an investigation by the Office of Professional Responsibility (OPR) for the Internal Revenue Service (IRS) of Plaintiff James Sexton and his company, Plaintiff Esquire Group LLC, regarding his status as a practitioner for tax purposes. Compl. at 4.

II BACKGROUND

A. Factual Allegations, Admitted by Defendant¹

The Court finds the following facts to be undisputed. This case arises from an investigation by the Office of Professional Responsibility (OPR) for the Internal Revenue Service (IRS) of

¹ The Court draws upon Plaintiff's Complaint (ECF No. 1), Defendant's Answer (ECF No. 45), and Defendant's Statement of Material Facts (ECF No. 62) as well as oral argument before the Court in determining the undisputed facts.

1 Plaintiff regarding his status as a practitioner for tax purposes. Plaintiff was previously a lawyer
 2 barred in South Carolina. Id. at ¶ 8. In 2005, Sexton pleaded guilty to four counts of mail fraud
 3 and one count of money laundering. Id. at ¶ 9. Sexton was subsequently disbarred in South
 4 Carolina and then suspended from practicing before the IRS by OPR in 2008. Id. at ¶ 10. He has
 5 not challenged this suspension. Id. at ¶ 10.

6 Prior to and during his suspension, Sexton has offered professional tax services as president
 7 of Esquire Group, LLC (“Esquire”). Id. at ¶ 13. Sexton assists with the preparation of tax returns
 8 for individual clients of Esquire. Id. at ¶ 14. He also performs various other duties within the scope
 9 of his employment with Esquire, including management, marketing, and client relations. Id. at ¶
 10 13. In September 2012, OPR received a complaint from Louise M. Kern, a former client of Sexton
 11 and Esquire. Defs. Resp. to MSJ, ECF No. 59, 5. Sexton assisted Kern in preparing her tax returns
 12 for 2010 and 2011, and offered to send her a written memorandum analyzing her options regarding
 13 her business’ tax obligations. Id. at 7. Before accepting Sexton’s offer, Kern found out about
 14 Sexton’s disbarment, and fired him in an email on September 12, 2012. Id. at 9. Following Kern’s
 15 Complaint, OPR initiated an investigation of whether Sexton was violating his suspension from
 16 practicing before the IRS. Id.

17 In October 2012 OPR wrote a letter to the Supreme Court of South Carolina seeking
 18 information regarding Sexton’s education and the date upon which he first became licensed to
 19 practice law in South Carolina. Id. at ¶ 18. On or about February 25, 2013, OPR sent a request to
 20 Sexton, as president of Esquire, for information related to an investigation of alleged unauthorized
 21 practice by Sexton during his suspension. Id. at ¶ 23. The letter’s reference line read, “Re:
 22 Suspected Practitioner Misconduct Under Circular 230”, and represented the onset of an OPR
 23 investigation. (ECF 1-1). Citing section 10.20(a)(3) of Treasury Department Circular No. 230
 24 (Regulations Governing Practice before the Internal Revenue Service) as the authority for its
 25 request, OPR requested a wide range of information from Sexton, alleging that this information
 26 was “required under section 10.2(a)(3)”. This included a request for detailed information on
 27 Sexton’s educational background; documents related to the incorporation of Esquire Group and its
 28 entity structure; a list of all members, employees, and independent contractors of Esquire Group

1 from the date of incorporation to the present; “any and all documents...and all information related
2 to Esquire Group’s business plan”; and an array of detailed requests regarding documents provided
3 to clients “relating to the preparation, the filing, and/or the submission of the clients’ Federal and
4 State tax returns.”

5 Sexton requested OPR to limit the scope of its original request for information. OPR
6 amended its request for information in an e-mail sent on April 12, 2013. *Id.* at ¶ 29. Sexton’s
7 Complaint in this case seeks to determine whether Defendants have jurisdiction or authority over
8 him, such that they can compel such disclosures from him, under 31 U.S.C. § 330.

9 Sexton seeks the following relief:

10 1) A declaratory judgment by the Court that Sexton is not a practitioner as defined by
11 federal law and that Defendants lack statutory authority to enact, promulgate or enforce
12 demands or authority over him and/or his employer Esquire as a result of Sexton’s
13 activities.

14 2) A declaratory judgment by the Court that Defendants and their agents are prohibited
15 from regulating the providing of tax advice generally, except as specifically provided
16 by statute and conferred upon them by Congress.

17 3) A permanent injunction prohibiting Defendants or their agents from seeking to enforce
18 Section 10.20 of Circular 230 against him.

19 **B. Procedural History**

20 Plaintiffs James Sexton and Esquire Group (Plaintiffs) filed their Complaint against
21 Defendant Hawkins on May 21, 2013. ECF No. 1.

22 Defendant filed a Motion to Dismiss on August 16, 2013. ECF No. 20. The Court held oral
23 argument on this Motion on September 18, 2014. ECF No. 37. The Court later denied the Motion.
24 ECF No. 42. Defendant appealed this decision on December 15, 2014. ECF No. 46. The parties
25 later voluntarily dismissed this appeal. ECF No. 71.

26 Plaintiffs filed a Motion for Judgment on the Pleadings on November 9, 2015. ECF No.
27 56. Defendant filed a Motion for Summary Judgment on December 23, 2015. ECF No. 64.

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1 **III. LEGAL STANDARD**

2 **A. Judgment on the Pleadings**

3 Fed. R. Civ. P. 12 (c) provides that “After the pleadings are closed--but early enough not
 4 to delay trial--a party may move for judgment on the pleadings. “A judgment on the pleadings is
 5 properly granted when, taking all the allegations in the non-moving party’s pleadings as true, the
 6 moving party is entitled to judgment as a matter of law.” United States v. Teng Jiao Zhou, 815
 7 F.3d 639, 642 (9th Cir. 2016) (quoting Fajardo v. Cty. of L.A., 179 F.3d 698, 699 (9th Cir.1999)).
 8 “Judgment on the pleadings is properly granted when there is no issue of material fact in dispute,
 9 and the moving party is entitled to judgment as a matter of law.” Fleming v. Pickard, 581 F.3d
 10 922, 925 (9th Cir. 2009).

11 **B. Summary Judgment**

12 Summary judgment is appropriate when the pleadings, depositions, answers to
 13 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no
 14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 15 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
 16 the propriety of summary judgment, the court views all facts and draws all inferences in the light
 17 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
 18 2014). If the movant has carried its burden, the non-moving party “must do more than simply show
 19 that there is some metaphysical doubt as to the material facts Where the record taken as a
 20 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
 21 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
 22 marks omitted).

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24 **IV. ANALYSIS**

25 Because the briefs regarding the parties’ Motions for Judgment on the Pleadings and
 26 Summary Judgment concern the same legal questions, the Court addresses them simultaneously
 27 below.

28 **A. Legal Standard For IRS Jurisdiction Over Tax Preparers or Advisors**

1 Plaintiffs argue that, consistent with the analysis of a recent D.C. Circuit Court case called
 2 Loving v. I.R.S., the authority of the I.R.S. does not extend to individuals who are not
 3 “representatives of persons before the [I.R.S.]”, and that therefore the I.R.S. lacks jurisdiction over
 4 Plaintiff. 742 F.3d 1013, 1015 (D.C. Cir. 2014). In Loving v. I.R.S., the D.C. Circuit analyzed, 31
 5 U.S.C. § 330 the statute that Defendants in this case rely on for authority to investigate and regulate
 6 Sexton. Id. “Section 330 of Title 31 authorizes the Secretary of the Treasury—and by extension,
 7 the IRS, a subordinate agency within the Treasury Department—to ‘regulate the practice of
 8 representatives of persons before the Department of the Treasury.’ 31 U.S.C. § 330(a)(1).” Id. The
 9 Circuit Court addressed the question of “whether the IRS’s authority to ‘regulate the practice of
 10 representatives of persons before the Department of the Treasury’ encompasses authority to
 11 regulate tax-return preparers like Sexton. 31 U.S.C. § 330(a)(1).” Id. at 1016. The Circuit Court
 12 answered in the negative.

13 In so doing, the D.C. Circuit found that tax preparers are not representatives under Section
 14 330: “[i]n light of the way the Code treats tax preparation, it would be quite wrong to say that a
 15 tax-return preparer ‘represents’ the taxpayer in any meaningful legal sense. In short, the statute’s
 16 use of the term ‘representative’ excludes tax-return preparers.” Id. at 1016-17. The D.C. Circuit
 17 further found that preparing and signing tax returns are not considered as practice before the
 18 Department: “[a]lthough the exact scope of ‘practice before’ a court or agency varies depending
 19 on the context, *to ‘practice before’ a court or agency ordinarily refers to practice during an*
 20 *investigation, adversarial hearing, or other adjudicative proceeding.*” Id. at 1018 (emphasis
 21 added).

22 This Court agrees with the analysis and holding of the D.C. Circuit in Loving as to the
 23 statute and its scope in relation to practitioners versus tax-preparers. The Court adopts this legal
 24 analysis and reasoning for this case.

25 Treasury Department Circular No. 230 (Regulations Governing Practice before the Internal
 26 Revenue Service), 31 C.F.R. Subtitle A, Part 10 implements the authority Congress gave the
 27 Secretary of the Treasury in 31 U.S.C. § 330 to regulate practice before the IRS. Circular 230
 28 “contains rules governing the recognition of attorneys, certified public accountants, enrolled

1 agents, enrolled retirement plan agents, registered tax return preparers, and other persons
 2 *representing taxpayers before* the Internal Revenue Service. Subpart A of this part sets forth rules
 3 relating to the authority to practice before the Internal Revenue Service; subpart B of this part
 4 describes the duties and restrictions relating to such practice; subpart C of this part describes the
 5 sanctions for violating the regulations; subpart D of this part contains the rules applicable to
 6 disciplinary proceedings; and subpart E of this part contains general provisions relating to the
 7 availability of official records.” 31 C.F.R. § 10.0 (emphasis added).

8 **B. Discussion**

9 The Court finds that Plaintiff is not subject to the I.R.S.’s regulatory authority under
 10 Section 330. The analysis and holding in Loving apply with equal force to this case.

11 Defendant makes two arguments. First, Defendant argues that 31 U.S.C. § 330 (“Section
 12 330”) extends to tax professionals who are not authorized to practice before the IRS because they
 13 are suspended from practice due to misconduct, yet offer services within the scope of the statute
 14 and its implementing regulations. Second, Defendant argues that § 330 extends to tax professionals
 15 who offer written tax advice within the meaning of subsection (d), regardless of whether they
 16 represent clients in a typical tax controversy before the IRS. The Court does not find either of these
 17 arguments persuasive.

18 **1. *Suspended Representatives² Are Not Covered under Section 330***

19 The Defendant offers several bases for its general proposition that Section 330 creates an
 20 inherent jurisdiction or authority over former practitioners before the IRS. The Court rejects all of
 21 these arguments seeking to create this inherent authority.

22 First, Defendant argues that 31 U.S.C. § 330 (“Section 330”) extends to individuals who
 23 have previously been authorized to practice before the IRS but whose authority to practice before
 24 the IRS has been suspended but not completely terminated. Defendant concedes that neither

26 ² Defendants use the term “practitioner” based on its use in 31 C.F.R. § 10.51(a)(18), which precludes
 27 “willfully representing a taxpayer before an officer or employee of the IRS unless the practitioner is authorized to do
 28 so...”. 31 C.F.R. § 10 interprets the authority conferred to the Secretary of Treasury in 31 U.S.C. § 330 to regulate
 “representatives of persons before the [I.R.S.]”. Therefore, the Court understands the terms “practitioner” and
 “representative” to be interchangeable for purposes of this analysis, and will use the term “representative” in its
 discussion of 31 U.S.C. §330, and “practitioner” in its discussion of 31 C.F.R. § 10.51, for the sake of clarity.

1 Section 330, nor the regulations promulgated thereunder in 31 C.F.R. Part 10 (Circular 230),
 2 expressly provide that OPR's regulatory authority extends to persons who are suspended from
 3 practice before the IRS. To the extent that Circular 230 prevents suspended lawyers from practice,
 4 however, Defendant argues that “[a]lthough Sexton is a disbarred lawyer, for Circular 230
 5 purposes he is [also] a suspended practitioner.” Defendant then cites to a general principle that a
 6 professional licensing or disciplinary body retains authority over a suspended member to
 7 investigate and act on alleged violations of the suspension or violations of law or rules of
 8 professional conduct while suspended. However, Defendant's only authority for this proposition
 9 are non-binding state court cases, namely Kirven v. Secretary of the Board of Commissioners on
 10 Grievances and Discipline, 246 S.E.2d 857, 858 (S.C. 1978) (“based on his assumption that an
 11 attorney who has been indefinitely suspended is not an attorney and thus is not subject to this
 12 Court's disciplinary authority...[t]his assumption is false.”). The Court is unaware of any binding
 13 authority or federal case law holding that a disbarred lawyer is the equivalent of a suspended
 14 representative under Section 330.³ The Court rejects this argument.

15 Second, Defendant argues that OPR has inherent jurisdiction over unauthorized practice
 16 by either (i) those who lack the requisite credentials to practice (because they are unlicensed as an
 17 attorney or CPA or unenrolled by the IRS as an enrolled agent, enrolled actuary, or enrolled
 18 retirement plan agent), or (ii) those who are suspended from practice for violating the regulations
 19 governing practice. However, Defendant cites to no authority for the OPR's “inherent
 20 jurisdiction.” The Court is unaware of any case law or regulations that stand for this proposition.
 21 The Court declines to create such an expansive ‘inherent jurisdiction’ for the IRS.

22 Third, Defendant argues that regulations interpreting Section 330 prohibit representing a
 23 taxpayer before an officer or employee of the IRS unless authorized to do so. 31 C.F.R.
 24 §10.51(a)(18). This is true. However, 31 C.F.R. §10.51(a)(18) refers to Section 10.50, which
 25 prohibits practitioners from practice before the IRS. The Court in Loving dealt with this exact
 26 language, and deemed that the IRS's statutory authority to “regulate the practice of representatives

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 28 ³ Kirven is also unavailing. Kirven involved the jurisdiction of the state agency's authority *to investigate* an
 allegation of misconduct, but not whether the particular individual was subject to the agency's authority such that he
 would be legally required to respond to a complaint or request for documents. 246 S.E.2d at 858.

1 of persons before the Department of Treasury” does not encompass authority to regulate tax-return
 2 preparers, and therefore that IRS regulations interpreting § 330 this way were overbroad. Loving,
 3 742 F.3d at 1017 (“Put simply, tax-return preparers are not agents. They do not possess legal
 4 authority to act on the taxpayer’s behalf... ‘representation’ of a taxpayer before the IRS requires
 5 formally obtaining the taxpayer’s power of attorney, something tax-return preparers do not
 6 typically obtain when preparing returns. Moreover, because a tax-return preparer is not a
 7 representative, the taxpayer ordinarily must still sign and submit the return in his or her own
 8 name...”). This Court agrees with Loving’s analysis of the statutory text and context of Section
 9 330, and finds them equally applicable here. In this case, Sexton’s tax preparation activities are
 10 insufficient to grant OPR authority to regulate his business practice under Section 330. There is no
 11 evidence in this record that Sexton or Esquire “practiced” before the IRS or represented taxpayers
 12 before the IRS in any adversarial proceeding during the period in question in this case.

13 Fourth, Defendant argues that the Secretary has broad discretion under Section 330
 14 including the “inherent power” to investigate and sanction those who engage in practice without
 15 authority to do so or who engage in practice contrary to the rules of practice. Defendant argues
 16 that because Section 330(b) gives the Secretary the power to suspend an individual from practice,
 17 the reasonable presumption is that Congress intended for oversight to continue after suspension
 18 given that the statute also includes the more severe sanction of disbarment, as well as the
 19 alternative sanction of a monetary penalty, either or both of which are potentially available in the
 20 case of practitioners who essentially disregard a censure or suspension. This presumption,
 21 however, does not logically follow from the statute. The fact that the statute allows for varying
 22 levels of discipline supports only the inference that the Secretary has the authority to impose
 23 different sanctions based upon the severity of the violations of the practitioner.⁴ It does not support
 24 a presumption or inference that the Secretary would have the authority to regulate the provision of
 25 certain types of professional services, such as tax preparation, which he would otherwise not be
 26 able to regulate but for the fact that the offeror of such services had previously been a practitioner

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 28 ⁴ The Court does not reach in this decision the question of whether the IRS could choose to “disbar” Sexton
 or Esquire under Section 330 based upon an IRS determination that Sexton or Esquire have not adequately prepared
 tax forms.

1 before the IRS. An individual or entity does not subject himself to indefinite and undefined
 2 oversight by the IRS based upon suspension. Indeed, this would result in suspension becoming
 3 potentially a more severe penalty than disbarment. In any event, the Court does not find that
 4 suspension, as argued by Defendant, allows for continued or indefinite regulation of previous
 5 practitioners in their subsequent employment as tax preparers.

6 Fifth, Defendant argues that it has inherent authority to regulate those practicing before it.
 7 Defendant cites to Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926), where the Court
 8 determined that “so necessary is the power and so usual is it” for an agency to regulate
 9 practitioners, that a general grant of authority to the Board of Tax Appeals necessarily included
 10 the authority to determine who was qualified to practice before it. Id. at 122. This Court reiterates
 11 here its agreement with the analysis of Loving, that the IRS does have the authority to regulate
 12 representatives or practitioners before it, but that this authority does not extend to tax preparers or
 13 suspended former practitioners who are not tax preparers. The Court is unpersuaded that Defendant
 14 has such inherent authority as it relates to tax preparation, as it would dramatically expand the
 15 IRS’s scope of regulatory authority, as “the IRS would be empowered for the first time to regulate
 16 hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry. Yet
 17 nothing in the statute’s text or the legislative record contemplates that vast expansion of the IRS’s
 18 authority.” Loving, 742 F.3d at 1021. And the fact that an individual was formerly a practitioner
 19 before the IRS cannot expand IRS jurisdiction into an area where no jurisdiction previously
 20 existed.

21 Thus, the Court rejects Defendant’s first general argument that IRS’ authority and
 22 jurisdiction extends to tax professionals who are not authorized to practice before the IRS because
 23 they are suspended from practice due to misconduct.

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25 **2. Section 330 Does Not Extend to Tax Professionals Offering Written
 26 Advice Regardless of Whether They Represent Clients in a Tax
 27 Controversy Before the IRS**

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1 Defendant argues that § 330 extends to tax professionals who offer written tax advice
2 within the meaning of subsection (e), regardless of whether they represent clients in a typical tax
3 controversy before the IRS.
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5 Defendant argues that OPR asserted jurisdiction over Sexton because of an allegation that
6 he had been practicing before the IRS, not just preparing tax returns. Defendant states that the
7 definition of “practice before the Internal Revenue Service” in §10.2(a)(4) in pertinent part
8 provides that it includes “rendering written advice with respect to any entity, transaction, plan or
9 arrangement, or other plan or arrangement having a potential for tax avoidance or evasion.” In
10 support of its argument, Defendant cites to pre-Loving decisions by administrative law judges
11 (ALJs). In one case, an ALJ found that Section 330(d) applies to practitioners that did not represent
12 persons in cases before the IRS within the meaning of Loving. Director, Office of Professional
13 Responsibility v. Settles, Complaint No. 2004-11. Similarly, in 2009, an ALJ held that, under the
14 1996 version of Circular 230, a tax attorney had engaged in practice before the IRS when he issued
15 a written legal opinion to a client in connection with a proposed tax-motivated lease transaction.
16 Director, Office of Professional Responsibility v. Sykes, OPR Complaint No. 2006-1 (Decision of
17 Jan. 29, 2009). The Court finds that these ALJ decisions are not persuasive or controlling.
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19 Defendant also attempts to distinguish Loving from the instant case arguing that Loving
20 did not discuss Section 330(e) specifically, but rather addressed different subsections within
21 Section 330. Specifically, Defendant argues that “[t]he Loving plaintiffs were in the business of
22 preparing tax returns. They were not traditional Circular 230 practitioners, and they were not in
23 the business of authoring written tax opinions for corporate clients or high net-worth individuals.”
24 The Court finds Loving’s narrow interpretation of Section 330 to be applicable in this case. The
25 Loving court’s extensive analysis of Section 330 and its statutory history and context supports the
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1 narrow reading of the statute adopted in this order. See 742 F.3d at 1016-22 (reviewing the various
2 reasons based upon statutory interpretation that support a narrow reading of the statute).

3 However, even assuming that Loving did not impact Section 330(e), which the Defendant
4 appears to implicitly argue is a “catch all” section, the Court finds that Section 330(e) does not
5 apply to the facts in this case. Defendant concedes Sexton is permitted to prepare taxes under the
6 scope of his suspension, but argues that he may not offer written advice regardless of whether there
7 is a typical tax controversy before the IRS under Section 330(e). The Court does not find that the
8 plain language of Section 330(e) supports this interpretation. 31 U.S.C. § 330(e) states that
9 “Nothing in this section or in any other provision of law shall be construed to limit the authority
10 of the Secretary of the Treasury to impose standards applicable to the rendering of written advice
11 with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is
12 of a type which the Secretary determines as having a potential for tax avoidance or evasion.” At
13 most, it allows the Secretary to impose standards to the *rendering* of such advice—but does not
14 provide a mechanism to sanction such advice, nor the offering of such advice. This is in stark
15 contrast to the language of the statute elsewhere: “[a]fter notice and opportunity for a proceeding,
16 the Secretary may *suspend* or *disbar* from practice before the Department, or *censure*, a
17 representative...The Secretary may impose a *monetary penalty* on any representative described in
18 the preceding sentence...” 31 U.S.C. § 330(c). Second, this narrow interpretation of the language
19 is supported by the regulations promulgated by the Secretary. Section 10.2 of the regulations does
20 not have a separate definition for “written advice” that would encompass individuals who are tax
21 preparers but not practitioners providing such written advice. Rather, Section 10.2 references
22 “written advice” only in the definition of “practice.” 31 C.F.R §10.2. This Court has already found,
23 consistent with the holding in Loving, that “to ‘practice before’ a court or agency ordinarily refers
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1 to practice during an investigation, adversarial hearing, or other adjudicative proceeding” before
2 the IRS and that this does not encompass the work of tax preparers. Id. at 1018. The Court thus
3 finds that the plain language of the statute does not support the expansive reading suggested by the
4 Defendant.
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6 The Court additionally finds that even if Loving did not explicitly identify Section 330(e)
7 as part of its analysis, the Loving court’s statutory analysis as to the reach and limitations of Section
8 330 apply with equal force to Subsection (e). For example, this Court also rejects the Defendant’s
9 interpretation in this case since it would, as the court noted in Loving, render superfluous the
10 statutory scheme that Congress has enacted separately for the regulation of tax preparers. See,
11 e.g., 26 U.S.C. §§6694, 6695 and 6713 (outlining tax preparer responsibilities and civil penalties
12 related to misconduct by tax preparers). Congress has not indicated any intention to supplant this
13 regulatory scheme. Indeed, Congress continues to revise and amend these regulatory statutes
14 related to tax preparers even within the time frame of the litigation of this case. See, e.g., Pub.
15 Law No. 114-113, §§ 207(a) and 210(a), 129 Stat. 3085(2015) (revising Sections 6694 and 6695).
16 The existence of a separately enacted regulatory scheme directly related to tax preparers negates
17 the Defendant’s argument that Congress intended Section 330 to authorize the IRS to separately
18 regulate tax preparers.
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20 Further, the Defendant points to no authority to support its argument that the written advice
21 does not need to be given in the context of an actual proceeding or investigation before the IRS,
22 i.e., practicing before the IRS. As this Court has noted such practice necessarily involves
23 representation in the context of a proceeding for purposes of § 330. And in this case, it must be
24 emphasized that based on the undisputed factual record in this case, Sexton merely *offered* to send
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1 written advice to Kern, but did not in fact render any such advice, since Kern fired him after finding
2 out about his disbarment.

3 In short, the Court finds that in this case, Section 330(e) does not extend to Sexton, a tax
4 preparer and disbarred attorney, who offered to write a written memorandum to a taxpayer about
5 the manner in which she may want to file her taxes.

6 Therefore, the Court grants Plaintiff's Motion for Judgment on the Pleadings (ECF No.
7 56), and denies Defendant's Motion for Summary Judgment (ECF No. 64).

8 **C. Permanent Injunction**

9 Plaintiff seeks both declaratory and injunctive relief, both of which the Court deems
10 appropriate here. Regarding declaratory relief, Plaintiff seeks declaratory judgment that: 1) Sexton
11 is not a practitioner as defined by federal law and that Defendants lack statutory authority to enact,
12 promulgate or enforce demands or authority over him and/or his employer Esquire as a result of
13 Sexton's activities; and 2) Defendants and their agents are prohibited from regulating the providing
14 of tax advice generally, except as specifically provided by statute and conferred upon them by
15 Congress. Regarding injunctive relief, Plaintiff asks this Court to permanently enjoin the IRS from
16 seeking to enforce Section 10.20 of Circular 230 against both Sexton and his company Esquire
17 and requiring them to provide documents and information to Defendants upon demand.

18 "The Declaratory Judgment Act provides that, '[i]n a case of actual controversy within its
19 jurisdiction ... any court of the United States ... may declare the rights and other legal relations of
20 any interested party seeking such declaration, whether or not further relief is or could be sought.'
21 28 U.S.C. § 2201(a)." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007). The Court
22 employs a four-factor test to determine whether to issue an injunction, examining whether (1) the
23 plaintiff has suffered an irreparable injury; (2) "remedies available at law, such as monetary
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1 damages, are inadequate to compensate for that injury”; (3) “considering the balance of hardships
 2 between the plaintiff and defendant, a remedy in equity is warranted”; and (4) a permanent
 3 injunction would not disserve the public interest. eBay Inc. v. MercExchange, L.L.C., 547 U.S.
 4 388, 391 (2006).

5 Sexton has satisfied all four prongs of this test. While Sexton’s injuries are largely
 6 financial, which alone would not support a finding of irreparable harm, See Rent-A-Center, Inc.
 7 v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991), Sexton also
 8 argues that Defendant’s actions, if they were to continue, would result in the effective termination
 9 of his vocation. As in Loving, the Court finds that this constitutes irreparable injury. Loving v.
 10 I.R.S., 917 F. Supp. 2d 67, 81 (D.D.C. 2013), aff’d, 742 F.3d 1013 (D.C. Cir. 2014) (“Plaintiffs
 11 declare that they will likely close their tax businesses if forced to comply with the new Rule, which
 12 the Court concludes would be an irreparable injury.”); See also Nat'l Mining Ass'n v. Army Corps
 13 of Eng'rs, 145 F.3d 1399, 1408–09 (D.C.Cir.1998) (“Money damages were never sought in this
 14 action, and even if the government were somehow found to have waived its sovereign immunity
 15 against damage actions, it is hard to see the relevance of such remedies in the context of a pre-
 16 enforcement challenge to agency regulations. The plaintiffs did seek (and obtain) a declaration of
 17 the [challenged] Rule's invalidity, but this brand of relief is itself more equitable than legal in
 18 nature.”). The Court further finds that Sexton lacks an adequate remedy at law regarding his ability
 19 to challenge the OPR’s actions. The Court also concludes that the balance of hardships tips in
 20 Sexton’s favor, as the IRS’s actions were not permissible under Section 330 and Plaintiff has
 21 suffered financial loss. Finally, a permanent injunction would serve the public interest because of
 22 the inapplicability of Section 330 to tax preparers such as Sexton.

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The Court will therefore grant Sexton's request for permanent injunctive relief.

V. CONCLUSION

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Judgment on the Pleadings is granted. ECF No. 56. The Court issues the following declaratory judgement ruling and findings:

1. Sexton is not currently a practitioner as defined by Treasury Department Circular No. 230 (Regulations Governing Practice before the Internal Revenue Service), 31 C.F.R. Subtitle A, Part 10, implementing 31 U.S.C. § 330. Defendants lack statutory authority to enact, promulgate or enforce demands or authority over him and/or his employer Esquire as a result of Sexton's activities regarding tax preparation or consultation as described in this case.

2. Defendants and their agents are prohibited from regulating the provision of tax advice by Sexton or Esquire consistent with this Order.

IT IS FURTHER ORDERED that Defendants or their agents are permanently enjoined from seeking to assert authority or jurisdiction over Sexton or Esquire regarding his/their tax preparation activities, pursuant to Treasury Department Circular No. 230 or 31 U.S.C. § 330.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment is denied.

DATED: March 17, 2017.

SP

RICHARD F. BOULWARE, II
United States District Judge